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No. 93-108

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

COLUMBIA RESOURCE COMPANY, L.P.,
a Washington limited partnership,
Petitioner

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent

Reply Brief to Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

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REPLY BRIEF

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REPLY BRIEF

I. INTRODUCTION

In its opposition to petitioner Columbia Resource Company, Limited's (CRC) petition for a writ of certiorari to the Oregon Supreme Court, the State of Oregon

contends that CRC's petition is best left ungranted because CRC's standing in federal court is "uncertain," its constitutional challenge too "narrow," and its record "[under]developed." (St.'s Reply Brief, pgs. 5, 8, 15.) The State's opposition is without merit.

Alleged uncertainty of CRC's standing to challenge the fee on foreign waste, election of a procedural course concentrating on the fee's facial invalidity, and want of a record illustrating the fee's operative impact are subjects altogether immaterial to the propriety of United States Supreme Court review of this matter.

II. THE NATURE OF THE PROCEEDINGS BELOW RENDERS THE ISSUE PRESENTED IDEAL FOR MEANINGFUL REVIEW.

The State seizes upon CRC's election of an administrative challenge as a factor

militating against review.[1] (St.'s brief, pgs. 4-5). Apparently, the State believes that the federal question presented would be riper for review if the peculiarities of the Oregon circumstance were thoroughly developed. Were that the case, and were this Court to accept review, the nation's highest tribunal would labor to solve a provincial problem. That the federal question is limited to facial validity under the Constitution, in this case the Commerce Clause, and is therefore divorced from context exclusive to Oregon, distills the

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[1]The State portrays CRC's choice of procedure as myopic, suggesting that federal court, state trial court, or agency review would have been a more responsible course. On the contrary, CRC's forum selection was carefully considered. A section 1983 action in federal district court suffered exposure to defenses including failure to exhaust administrative remedies. Alternatively, under Oregon's Administrative Procedures Act, a state trial court has jurisdiction to review a rule only after its violation as a defense to enforcement of an agency order. Or. Rev. Stat. § 183.484. Finally, the administrative remedy to which the State refers is discretionary with the agency or requires violation of the rule. Or. Rev. Stat. § 183.410 ("On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability * * * of any rule or statute enforceable by it").

issue of discriminating compensatory fees to its most generic, far-reaching quality--the essence of Supreme Court business.

Contrary to the State's assertion, this case presents the classic platform from which the Court may dictate the nation's law concerning waste disposal and compensatory fees.

A. THE STATE'S WARNING CONCERNING CRC'S "UNCERTAIN" STANDING IN FEDERAL COURT IS CONTRIVED.

The State cautions that review "would be plagued by questions of standing" because "[p]etitioners must * * * demonstrate that they have suffered * * * injury* * * to challenge the fee in the federal courts." (St.'s brief, pgs. 6, 8.)

CRC's reply is twofold. First, assuming the federal standard is implicated, every element necessary for its satisfaction is already referenced by the State on page 6

of its brief.[2] As an interstate transporter of waste from Washington State to Oregon, increased fees for disposal in Oregon will naturally have a chilling effect on demand for the service CRC provides; the threat of injury, therefore, is apparent. Data Processing Service v. Camp, 397 US 150, 151-152 (1970). Moreover, because CRC asserts its right to engage in interstate commerce free from discriminatory fees, and because the surcharge on foreign waste infringes upon that right, CRC is "arguably within the zone of interests to be protected * * * by the * * * constitutional guarantee in question." Boston Stock Exchange v. State Tax Comm'n., 429 US 318, 320, n. 3 (1977) (quoting Data Processing, 397 US at

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[2]The State acknowledges that the Oregon courts recognized CRC's stake in this controversy; however, by quoting the word "interests" used by the Oregon courts the State attempts to imply that CRC's stake somehow falls short of standing.

153).[3] Second, again, assuming CRC must make an independent showing on standing, and assuming its satisfaction of the federal standard is not apparent, this Court's review certainly will not be "plagued by questions of standing." The Court need only apply the law and move on.

B. THE STATE'S CONCERN FOR THE FEE'S ACTUAL IMPACT ON INTERSTATE COMMERCE IS A DISTRACTION.

At page 8 of its brief, the State maintains that the absence of any showing of actual impact on interstate commerce creates a "troubling void." The State's argument extends from a manufactured misunderstanding of the Commerce Clause.

There are at least three distinct avenues of attack under the Commerce Clause available to an affected party, any of which

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[3]The State argues that CRC does not suffer injury by virtue of the surcharge because the cost is passed through to consumers. Practically speaking, all business costs are passed through to consumers; it is the effect of that pass through on the demand for goods and services which occasions the injury to business. Any argument to the contrary is somewhat naive.

may result in a determination that a given law is unconstitutional. If a law *discriminates on its face*, it will be invalidated unless the State can justify the discrimination. Hughes v. Oklahoma, 441 US 335, 336 (1979). Alternatively, if a law *discriminates in effect* (as applied), it will be invalidated unless the State can justify the discrimination. Id. Finally, if a law *does not discriminate*, it will be invalidated if the relative burdens favor interstate commerce (balance of interests). Pike v. Bruce Church, Inc., 397 US 137, 142 (1970).

Driven by circumstance, CRC elected the first avenue--a facial challenge. A facial challenge, however, by definition, requires no showing of actual impact on interstate commerce. That showing is appropriate only for an "as applied" or "balance of interests" challenge. Essentially, the State argues that a writ of certiorari

should not issue because the Oregon Supreme Court's disposition of CRC's facial challenge does not lend itself to review of an "as applied" or "balance of interests" challenge--challenges CRC has not made in this proceeding.

The State is apparently of a mind that every Commerce Clause test must be implicated before review is appropriate. Surely that cannot be.

C. BECAUSE A FACIAL CHALLENGE IS BY DEFINITION DIVORCED FROM CONTEXT, THE ABSENCE OF A FACTUAL RECORD IS OF NO CONSEQUENCE.

The State denigrates the record in this case because it is factually underdeveloped. (St.'s brief, pgs. 11-15.) The State may as well malign the apple cart for its lack of oranges. A factual record beyond that in this proceeding is immaterial to a facial challenge.

The State first attempts to distance this case from Government Suppliers Consolidating Serv. v. Bayh, 975 F.2d 1267

(7th Circuit 1992), cert. denied, 113 S. Ct. 977 (1993), by illuminating the latter's factual record. CRC offers two observations in reply. First, the State characterizes the distinction between this case and Government Suppliers as if the latter was the one more properly fit for review. This Court, however, declined to review Government Suppliers. It is therefore difficult to understand how the distinction advances the State's point.

Second, the trial court's findings of fact in Government Suppliers to which the State refers were completely disregarded in the seventh circuit's facial review of the tipping fees at issue. See Id. at 1283-1285. In fact, contrary to the State's representation, the seventh circuit, itself, expressed misgivings about an abbreviated record:

> The ripeness for facial review of * * * the disposal fees is a closer question. The implementing regulations have not

> yet been written or adopted. However, as the Supreme Court stated* * *, "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." * * * In the present case, however, what the statutes authorize is clear; only procedures and amounts are uncertain. There is no need to wait for regulations or specific applications to evaluate and make a conclusive determination as to the legal issue presented.

Id. at 1275-1276 (citations omitted.) This record, on the other hand, where it matters, is more developed than Government Suppliers. In addition to statutory authorization, procedures and amounts became certain with EQC's implementation of administrative rules. See OAR 340-61-115, 120.

The State also maintains that "the record is inadequate to resolve any claim that the fee has an economic protectionist effect* * *." (St.'s brief, pgs. 12-13.) To this position is joined the State's misguided contention that CRC unseasonably incorporated into its petition arguments on protectionist effect. A new argument on an

old issue is entirely appropriate.[4]

The State's forebodings about this record's inadequacy are belied by at least a half century's worth of decisions, for time and again the Court has gleaned protectionist effect from the face of a law. For example, in Philadelphia v. New Jersey, 437 U.S. 617 (1978), the Court had before it a record replete with findings of fact concerning protectionism, as well as the parties' respective responses to those findings. See Id. at 625-626. Justice Stewart, however, explicitly discounted them: "Contrary to the evident assumption

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[4]The State posits that "CRC improperly injects into its petition" arguments demonstrating the fee's protectionist effect, St.'s brief, pg. 13, though it does not say why. The State confuses new arguments with new issues. New issues, if not passed upon below, may not be raised on appeal. Singleton v. Wulff, 428 U.S. 106, 120 (1976). The issue in this case is the facial validity of Oregon's surcharge on foreign waste under the Commerce Clause. New arguments supporting either side's position on the issue are not barred on appeal. Campbell, Extent to Which Courts of Review Will Consider Questions not Properly Raised and Preserved--Part I, 7 Wis. L.Rev. 91, 97 (1933). CRC's additional observations concerning the fee's protectionist effect are derived from the face of the rule. The State's protest, therefore, is without merit.

of the State court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends." New Jersey's importation ban was accordingly stricken on its face as protectionist legislation. Id. at 628.

Similarly, in Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984), Justice Powell employed his own hypothetical to demonstrate that West Virginia's manufacturing tax, on its face, discriminated against interstate commerce. The court dispelled the State's concern here that the record is inadequate:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a state that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test.

Id. at 644.

The point is illustrated yet again in Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1983). In conducting a facial

review of a New York tax credit, Justice Blackman hypothesized circumstances under which the credit would impermissibly protect New York's interests. Id. at 400-402, n. 9. Again, the State's concern here was specifically addressed:

> When a tax, on its face, is designed to have discriminatory economic effects, the court "need not know how unequal the tax is before concluding that it unconstitutionally discriminates."

Id. at 406-407 (quoting Maryland v. Louisiana, 451 U.S. 725, 760 (1981).

Philadelphia, Armco, and Westinghouse represent only a sampling of the law questioning the State's claim that the record here is inadequate. To completely catalog the State's misapprehension of the law would itself exhaust CRC's page limit in reply.

/ / / /

CONCLUSION

CRC's petition for writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 1993

crc\pleading\reply.brf